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PUBLIC UTILITIES

BOARD OF PUBLIC UTILITIES

Service Connections

Extensions of Service

Adopted Amendments: N.J.A.C. 14:3-8.1, 8.2 and 14:18-3.2, 6.2 and 11.2

Adopted Repeals: N.J.A.C. 14:5-2.1, 14:6-3.1 and 14:9-2.1

Proposed: May 2, 2005 at 37 N.J.R. 1401(a)

Adopted: September 30, 2005 By the Board of Public Utilities, Jeanne M. Fox, President, and Frederick F. Butler, Connie O. Hughes, and Jack Alter, Commissioners.

Filed: _____, 2005 as R. 2005 d. _____, with substantive and technical changes not requiring additional public notice or comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 48:2-13, N.J.S.A. 48:2-16; N.J.S.A. 48:2-27, 48:2-23; N.J.S.A. 48:5A-36, and N.J.S.A. 48:5A-10

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BPU Docket Number: CX05030218 and AX05030217

Effective Date: November 7, 2005

Expiration Date: July 31, 2007, August 21, 2007 and March 27, 2006

On May 2nd, 2005 at 37 N.J.R. 1401(a) the Board of Public Utilities (Board) proposed amendments to its service connections and connections of service rules at N.J.A.C. 14:3-8, 5-2.1, 6-3.1, 9-2.1 and 14:18. These amendments govern the responsibility borne by cable television companies for the costs of certain investments in infrastructure, based upon whether the development is in an area designated for growth under the State Development and Redevelopment Plan (State Plan). The adopted amendments to N.J.A.C. 14:3-8 will apply those rules to cable television companies, and the adopted amendments to N.J.A.C. 14:18 will specifically incorporate the smart growth extension rules into any new or renewed municipal consent. Finally, the adopted repeals of N.J.A.C. 14:5-2.1, 14:6-3.1 and 14:9-2.1 will eliminate these sections because they conflict with the Board's Extensions of Service rules at N.J.A.C. 14:3-8. A public hearing on the proposal was held on June 7th, 2005.

Summary of Hearing Officer Recommendations and Agency Responses:

A public hearing on the proposal was held on June 7th, 2005 before Lance Miller, Chief of Staff, the Board's designated hearing officer. The Board also accepted written comments on the proposal through July 1st, 2005. At the direction of the hearing officer, the transcript and filed written comments were certified directly to the Board for its

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consideration. Four persons submitted comments, which are summarized below, with the Board's responses. The record is available for review by contacting:

Kristi Izzo, Secretary of the Board

ATTN: Board Docket Number: CX05030218 and AX05030217

Two Gateway Center

Newark, New Jersey 07102

Summary of Public Comments and Agency Responses:

The following persons submitted timely comments on the proposal:

1. Karen Alexander, New Jersey Cable Telecommunications Association (NJCTA)
2. Seema Singh, New Jersey Division of the Ratepayer Advocate (RPA)
3. Clint Odom, Verizon (VZ1)
4. Richard Chapkis, Verizon (VZ2)

1. COMMENT: Cable television operators are not subject to a regulatory regime that governs the recovery of investment in new service extensions. Rates for most services offered by cable television operators are not subject to any regulation. The key components of the Board's proposal of regulated rate base investment, infrastructure investment decisions subject to Board approval or

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disallowable, Board approved tariffs, typically do not play any role in establishing the rates charged by cable television operators. (NJCTA)

RESPONSE: The Board believes that the NJCTA's reliance on rate regulation is misguided. The Board is not attempting to regulate the rates of the cable television companies of the state within the rule amendments. Instead, the Board's rule amendments will regulate the ability of a cable television operator to pay for or financially contribute to the construction of cable television extensions. Federal law, 47 U.S.C. §§ 541, 544, 552 and 556 permit the Board to take these actions.

47 U.S.C. § 543 dealing with regulation of rates, is irrelevant here as the Board is not attempting to regulate the rates of the cable television companies but instead the Board simply seeks to enforce its rights to regulate their construction. 47 U.S.C. § 556 Coordination of Federal, State and Local Authority states, in part, that nothing shall be construed to restrict a state from exercising jurisdiction with regard to cable television services consistent with this title. 47 U.S.C. § 541(a) allows a local franchising authority, in this State the Board, to authorize the construction of the cable television system over the rights-of-way including the cost of the installation, construction, operation, or removal of such facilities be borne by the cable television operator or subscriber or a combination of both.

47 U.S.C. § 544 (b)(1) provides that during renewal, a franchise authority (in this case, the Board) may establish requirements for facilities and enforce those requirements. Our rule does not attempt to enforce any new provisions on the

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cable television operator until a franchise is renewed. 47 U.S.C. § 552(a)(2), provides that a franchising authority (the Board) may “establish and enforce...construction schedules and other construction-related performance requirements, of the cable television operator.” The cites provided show that the Board has firm federal and state legal footing to adopt the rules and enforce them on the state’s cable television operators.

2. COMMENT: Cable television companies will be severely disadvantaged, with no gain for Smart Growth, if you remove cable television as an option for future residents of now undeveloped areas. It will not discourage developers from going forward. Similarly, the scales for home buyers will not be tipped just because they could not get television through cable television because there are many off-the-shelf alternatives available to provide a multi channel video service. As a consequence, cable television operators will be put at an unfair competitive disadvantage. The disadvantage, and the regulatory uncertainty that the investment prohibition would produce, would have a chilling effect on the industry’s ability to attract private risk capital. Loss of capital is no small matter for an industry that has in the recent past invested more than \$3 billion to upgrade their systems. (NJCTA)

RESPONSE: The rule amendments will not remove cable television as an option for future residents. Instead, the rule amendments simply add cable television to the other regulated entities and thereby limit their ability, in certain

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circumstances, to pay for extensions of service. In those instances, applicants for extensions of new service may be required to pay for it. In addition, the argument that this will cause a loss of capital has not been proven in the past few years where despite a stagnant or negative growth in subscribership, the cable television industry has posted revenue gains.

3. COMMENT: The New Jersey Cable Television Act requires municipal consents to a cable television franchise to provide for the future expansion of cable television service to the entire municipality. It provides, "Pursuant to [a municipal consent] decision, the municipal governing body may reject all applications before it or may issue municipal consents to one or more applicants. But, no municipal consent or consents shall be granted unless it or they contain singly or in combination, provisions for the eventual extension of cable television service, upon a reasonable time schedule, to all parts of the territory of the municipality." (NJCTA)

RESPONSE: The Cable Act does not require a cable television operator to provide for the "eventual extension of cable television service" at its own cost. If this were the case, the line extension policy, or cost sharing formula, that has been in use for many years in franchises throughout the state would have been disallowed. Cable television companies have required that residents in low density areas share the cost of bringing the cable television facilities to their homes. This is permitted by state and federal law, at 47 U.S.C. § 541(a), which allows the local franchising authority to authorize the construction of the cable television system over the rights-of-way including the cost of the installation,

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construction, operation, or removal of such facilities be borne by the cable television operator or subscriber or a combination of both.

The Board's rule amendments expand on that to the extent permissible by State and federal law.

4. COMMENT: Federal law establishes the exclusive framework for the regulation of cable television service. The prohibition of capital expenditures for expansion of cable television facilities is not within that framework, thus we do not believe the State has the authority under federal law to impose such restrictions. (NJCTA)

RESPONSE: As discussed in comment #1 above, the Board is not attempting to regulate the rates of the State's cable television companies through this rule. In accordance with the court decision in *Housatonic Cablevision Co. v. Department of Public Utility Control*, 622 F. Supp. at 809, charges associated with construction are not rates. The court relied on 47 U.S.C. §§ 541, 544 and 552, cited above. Most importantly, this ruling affirmed it is the franchising authority, in New Jersey the Board, that may authorize the construction of the cable television operator and may determine whether the costs of installation and construction of the facilities shall be borne by the cable television operator or the cable television subscriber, or a combination of both. In the rule amendments, the Board has determined in areas not designated for growth, it is the customer, or the developer acting on behalf of the customer who must bear the cost of the

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installation of cable television. In areas designated for growth, cable television operators must provide installation in accordance with their tariffs on file with the Board.

5. COMMENT: Section 623 of the Cable Act provides that “[n]o Federal agency or State may regulate the rates for the provision of cable television service except to the extent provided under this section and section 612.” 47 U.S.C. § 543(a)(1). Section 623 delegates responsibility to the FCC to establish rate regulation rules applicable to cable television operators. Those rules allow local franchising authorities to regulate or otherwise act upon cable television rates only for the entry-level basic tier of service (BST) and only in accordance with the rules adopted by the FCC. Nothing in the FCC’s regulations permit a State or local government to restrict a cable television operator’s ability to recover through its subscriber rates the costs of infrastructure investment in its franchise area. Most cable television operators utilize the FCC’s benchmark methodology of rate regulation and therefore have no occasion to present their plant investment costs to local regulators for review. Cable television operators could opt to recover the capital costs of infrastructure investment in non-smart growth areas through price adjustments to their upper tiers of service or to premium services. However, a rule precluding a cable television operator from recovering in its basic service tier rates the costs of infrastructure investment in non-smart growth areas would contravene federal law. The Board itself has acknowledged

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that a regulatory framework that relies on disallowing recovery of investments in tariffed rates is wholly inapposite to cable television operators:

The content of tariff filings is entirely derived by the cable operator, and the rates included are in no way benchmarked, analyzed or in any other way subject to review and approval. The Board is legally precluded from rejecting a tariff filing based upon the rates charged. . . . *In the Matter of CSC Holdings, Inc., Petition for Declaratory Ruling*, FCC CSR-6279-R, Reply Brief of Attorney General of New Jersey on behalf of New Jersey Board of Public Utilities at 11.

The same is no less true for the rule amendments that rely on such a scheme.

(NJCTA)

RESPONSE: As noted above, because the Board recognizes the differences between a ratebase rate of return regulated entity and a cable television company; it has made a distinction within the rule amendments. However, the Board does not believe that it is on any less firm legal standing in enforcing its rules on cable television operators. Federal, State and case law provide that a franchising authority, the Board, may regulate how a cable television operator constructs its plant and determine who pays for the plant. The Board does not attempt to regulate the rates of the cable television operator in the rule amendments; the Board is simply setting forth rules for construction of the cable television system.

6. COMMENT: Unlike traditional utilities, State and local regulators have no authority to regulate, restrict or condition infrastructure investment by cable television operators. Title VI of the Communications Act of 1934, as amended,

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47 U.S.C. § 521 *et seq.*, defines and circumscribes the scope of government regulation of cable television operators. Section 636 of the Communications Act states that “any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.” 47 U.S.C. § 556(d). Section 621(c) of the Cable Act provides that “[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.” Restricting a cable television operator from recouping the costs of line extensions or precluding cable television operator financial support for investment in infrastructure in any portion of its franchise area would be tantamount to subjecting that operator to the type of regulation expressly barred by the federal Cable Act. (NJCTA)

RESPONSE: The Board disagrees. This type of action is permitted under 47 U.S.C. §§ 541, 544, 552 and 556 (cited above) and the New Jersey State Cable Act. In accordance with the court decision in *Housatonic Cablevision Co. v. Department of Public Utility Control*, 622 F. Supp. at 809, charges associated with construction are not rates. The court relied on 47 U.S.C. §§ 541, 544 and 552, cited above. Most importantly, this ruling affirmed it is the franchising authority, in New Jersey the Board, that may authorize the construction of the cable television operator and may determine whether the costs of installation and construction of the facilities shall be borne by the cable television operator or the cable television subscriber, or a combination of both. In

the rule amendments, the Board has determined in areas not designated for growth, it is the customer, or the developer acting on behalf of the customer who must bear the cost of the installation of cable television. In areas designated for growth, cable television operators must provide installation in accordance with their tariffs on file with the Board.

7. COMMENT: Section 621(a)(2) of the Communications Act specifies that “[a]ny cable franchise shall be construed to authorize the construction of a cable system over public rights-of-way...” 47 U.S.C. § 541(a)(2). Congress chose to grant franchised cable television operators a right of access to any right-of-way within a franchise area that has been dedicated for electric, gas or other utility transmission. Accordingly, the Board may not unilaterally withdraw a portion of the public rights-of-way from the franchise area the operator is authorized to serve – even those located in areas deemed “inappropriate” for growth. Section 621(a)(2) also grants cable television operators a federal right of access to easements that are dedicated for compatible uses. 47 U.S.C. § 541(a)(2). The Board’s proposed rule amendments permit developer-funded infrastructure in non-growth areas. To the extent that the construction of such infrastructure results in the establishment of easements for utility facilities, federal law entitles cable television operators to use such easements to install their own plant and facilities, notwithstanding any smart growth rules established by the Board. As

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noted above, moreover, the Board may not prevent cable television operators from funding construction in those easements. (NJCTA)

RESPONSE: The Board disagrees. As noted above in the response to comment 4 and 6, the Board can and may regulate the construction of the State's cable television companies and also who pays for the cost of construction of those facilities pursuant to State, and Federal legislation as well as relevant case law.

8. COMMENT: Section 624(a) of the Communications Act specifies that local governments "may not regulate the services, facilities and equipment provided by a cable television operator except to the extent consistent with this title." 47 U.S.C. § 544(a). The Cable Act does preserve the authority of States and localities "regarding matters of public health, safety, and welfare," but such authority also must be exercised in a manner that is consistent with the Cable Act. 47 U.S.C. § 556(a). While some reasonable conditions on cable television facilities deployment may be permissible, local rules that restrict or prohibit facilities deployment to a portion of a cable television operator's authorized franchise area contravene section 624. Imposing restrictions on cable television operator investments also runs afoul of section 624(e) of the Communications Act. That provision specifies that "[n]o States or franchising authority may prohibit, condition or restrict a cable television system's use of . . . any transmission technology." 47 U.S.C. § 544(e). The legislative history of this provision states that "the patchwork of local regulation that would result from a

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locality-by-locality approach” to use of cable television transmission technology “is particularly inappropriate in today’s intensely dynamic technological environment.” Application of “smart growth” restrictions to cable television systems would unduly restrict a cable television operator’s ability to “use” network transmission technologies in portions of its franchise area, in derogation of section 624(e)’s goal of avoiding “the effects of disjointed local regulation.” (NJCTA)

RESPONSE: The Board is not attempting to disallow cable television operators, or any other regulated entity from constructing facilities in any area of New Jersey or from using any specific type of transmission technology. The Board’s specified goal through the rule amendments is to regulate who pays for the facilities. Pursuant to 47 U.S.C. § 552(a)(2), the Board, as the franchising authority, may “establish and enforce...construction schedules and other construction-related performance requirements, of the cable television operator,” and 47 U.S.C. § 541(a), allows a franchising authority to authorize the construction of the cable television system over the rights-of-way including the cost of the installation, construction, operation, or removal of such facilities be borne by the cable television operator or subscriber or a combination of both. While the Board may not restrict the use of any network transmission technologies, pursuant to 47 U.S.C. § 544(e), to argue that this should be the reason that the Board may not impose rules for how a cable television operator may construct its facilities would be to invalidate the State’s franchising authority.

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9. COMMENT: Cable television franchises in New Jersey authorize cable television operators to build-out the franchise area and contain line extension policies. The Board's proposed rules could be construed to limit or modify these policies. Such a result would constitute an impermissible, unilateral modification of existing franchise agreements. While the Board's rules provide that a regulated entity may contribute financially to an extension in a non-growth area that is covered by a pre-existing franchise agreement, 14:3-8.8(f), the rules also provide that "the regulated entity shall pay for or financially contribute to the extension only to the extent that it previously committed to do so in a written agreement." To the extent that a pre-existing franchise agreement lacks a specific "commitment" by a cable television operator to financially support service extensions to non-growth areas, the rules as they apply to cable television companies could be construed to bar recovery of such investment, notwithstanding the prevailing understanding that cable television franchise agreements shall be construed to authorize service to all areas covered by a franchise agreement. (NJCTA)

RESPONSE: The Board disagrees. As noted above, regulation of construction is allowable. In addition, the Board as franchising authority has the ability to modify franchise agreements, after affording the holder an opportunity to be heard, pursuant to N.J.S.A. 48:5A-47. However, no existing franchise agreement will be modified through the rule amendments. The provisions of the rule amendments require that at the expiration of the franchise the cable television company must agree to abide by the terms of the rules. This means

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that if the cable television operator were to agree to a franchise last year for a term of ten years that franchise would be applicable for the whole of the franchise. Furthermore, the Board does not believe that there are any franchise agreements in existence that do not specify how cable television plant will be extended.

10. COMMENT: The Cable Act “establishes procedural standards that limit the ability of a franchising authority to establish or alter the terms of its agreement with a cable television operator to the franchising process.” A cable television franchise agreement is a contract. As such, its substantive provisions cannot be altered or modified unilaterally by local franchising authorities. Material alterations of the terms and conditions under which cable television operators can build extensions in their franchise areas would constitute an unlawful, unilateral modification of cable television franchise agreements by the Board. Cable television franchise agreements also are protected by the Contract Clause of the United States Constitution, U.S. Const., art. I, § 10, which states that “No State shall...pass any...Law impairing the Obligation of Contracts.” Any requirement that materially limits a cable television operator’s ability to fund service extensions to, or infrastructure investments in, any portion of its authorized franchise areas would be a “substantial” impairment of any cable television franchise because it would undermine the operator’s reasonable, investment-backed decisions under their franchises. (NJCTA)

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RESPONSE: As noted above, regulation of construction is allowable. In addition, the Board as franchising authority has the ability to modify franchise agreements, after affording the holder an opportunity to be heard, pursuant to N.J.S.A. 48:5A-47. However, no existing franchise agreement will be modified through the rule amendments. The provisions of the rule amendments require that at the expiration of the franchise the cable television company must agree to abide by the terms of the rules. This means that if the cable television operator were to agree to a franchise last year for a term of ten years that franchise would be applicable for the whole of the franchise. The rule amendments are prospective. By design they will not alter existing contracts or run afoul of the Contract Clause of the Constitution.

11. COMMENT: The rule amendments unlawfully impede cable television operators' ability to provide broadband facilities that can be used to provide voice services. To the extent voice services are offered as common carrier telecommunications services, for instance, these restrictions run afoul of section 253(a) of the Communications Act, which bars State or local regulation that "may prohibit or have the effect of prohibiting any entity" from providing any telecommunications service. 47 U.S.C. § 253(a). While the proposed rule amendments contemplate exceptions based upon the "public good" or "extraordinary hardship," the open-ended nature of these standards raises the prospect that these exceptions will be granted on an arbitrary basis. Section 253

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prohibits State and local governments from taking actions that effectively prohibit the provision of telecommunications services based upon vague or discretionary standards. Even if the smart growth rules are considered as rights of way management, they violate the policies of nondiscrimination and competitive neutrality embodied in section 253 because they do not apply to wireless voice services. To the extent cable television operators' voice services are broadband applications like Voice over Internet Protocol ("VoIP") rather than traditional telecommunications offerings, the limiting effects of the smart growth rules on cable television's deployment of broadband infrastructure would impermissibly impede the provision of an interstate information service. VoIP services provide capabilities and features that make them markedly different from conventional telephone services, including such features as video instant messaging and integration with email, bringing them within the Communications Act definition of an information service. As the FCC has observed, "courts have historically recognized the preeminence of federal authority in the area of information services, particularly in the area of the Internet and other interactive computer services." Indeed, the FCC itself has held that at least one form of VoIP is not subject to state regulation. One federal court has likewise found VoIP to be an information service and preempted state regulation. The State may not unreasonably interfere with the provision of these services. (NJCTA)

RESPONSE: As noted in the responses above, the Board is not attempting to disallow cable television operators, or any other regulated entity from constructing facilities in any area of New Jersey. The Board's goal through

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the rule amendments, and its current main extension rules is to regulate who pays for the facilities. Pursuant to 47 U.S.C. § 552(a)(2), the Board, as the franchising authority, may “establish and enforce...construction schedules and other construction-related performance requirements, of the cable television operator.” 47 U.S.C. § 541(a), allows a franchising authority to authorize the construction of the cable television system over the rights-of-way including the cost of the installation, construction, operation, or removal of such facilities be borne by the cable television operator or subscriber or a combination of both. Once the cable television operator has its facilities in place, it is true that the Board may not restrict the use of any network transmission technologies to provide telecommunications services, pursuant to 47 U.S.C. § 253. However, to argue that this should be the reason that the Board may not impose rules for how a cable television operator may construct its facilities would be to invalidate the State’s franchising authority entirely. Moreover, contrary to the commentor’s assertions, the exemption provisions of the main extension rules are not arbitrary or vague. N.J.A.C. 14:3-8.8 provides specific criteria petitioners must show to the Board in order for their exemption to be granted.

Cable television operators including those that offer VoIP currently engage in line extension policies that require customers in low density areas to pay for extensions of service. The Board is simply using its statutory authority to expand upon and codify this well established practice.

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12. COMMENT: Cable television operators engage in and transmit speech, and are entitled to the protections of the First Amendment. Local government actions that restrict a cable television operator's ability to reach potential subscribers "plainly implicate First Amendment concerns," even where the intent of such actions is to regulate infrastructure deployment rather than speech. At a minimum, smart growth restrictions on cable television investments would have to pass the intermediate scrutiny standard applicable to First Amendment infringements. Under this standard, the inquiry is whether the infringement furthers an important or substantial government interest unrelated to the suppression of free expression and does not restrict First Amendment freedoms more than necessary to further that interest. The "narrow tailoring" requirement under intermediate scrutiny requires that "the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." In this instance, the means chosen to effectuate the "smart growth" initiative – prophylactic limits on cable television investments in facilities – may fail the "narrow tailoring" criterion, in light of the fact that cable television construction tends to lag, rather than precede, development. (NJCTA)

RESPONSE: The Board's rule amendments do not attempt to regulate programming or content of the cable television operator and therefore do not raise First Amendment issues. Instead, the rule amendments rely on proven State, federal and case law (*Housatonic v. DPUC*) cited above, to regulate the construction of the cable television operator and more importantly, who pays for the construction when it occurs.

13. COMMENT: Local ordinances that restrict cable television operator speech in a discriminatory manner vis-à-vis other content providers have also been held to violate the First Amendment. In *Comcast Cablevision v. Broward County*, the court invalidated a local ordinance that “impose[d] a significant constraint and economic burden directly on a cable operator’s means . . . of expression.” The court found that the ordinance “discriminate[d] against those cable operators who choose to provide Internet content” and specifically noted its lack of application to “wireless, satellite” and other providers of Internet content. The “smart growth” restrictions have an impermissible discriminatory impact on a cable television operator’s ability to transmit speech to certain residences relative to other content distributors, such as broadcasters and wireless and satellite multichannel video providers. (NJCTA)

RESPONSE: In the cite provided, the case history provides that Broward County adopted an ordinance requiring cable system franchisees to provide third party access to its broadband Internet transport services on rates, terms, and conditions at least as favorable as those on which it provides such access to itself to any requesting Internet service provider. The county contended that the ordinance was needed to level the playing field among competitors and guarantee its citizens access to a diversity of Internet service providers. The Board’s rule amendments do not deal with restricting or allowing access to a cable television company’s system but simply deal with construction issues and funding mechanisms thereto that the Board has had the authority to regulate.

14. COMMENT: State laws that do not directly regulate but adversely affect interstate commerce are invalid when the burden they impose on interstate commerce is “clearly excessive in relation to the putative local benefits.” Under the “dormant Commerce Clause” doctrine, State laws may be invalid when they undermine the need for national uniformity in regulation. Cable television service has long been recognized as an interstate service generally subject to the exclusive authority of the FCC, except for certain specifically defined areas of authority delegated to State or local authorities, often under FCC guidelines (e.g., local franchising, maintaining the public rights-of-way, basic rate regulation, and customer service standards). Uniform national communications policy with respect to cable television systems would be undermined if State and local governments were permitted to regulate cable television operators’ infrastructure investment in piecemeal fashion. Application of local “smart growth” infrastructure investment restrictions to cable television operators would violate the Commerce Clause because it would undermine the uniform, national regulatory policy recognized by the Supreme Court and embodied in the Cable Act. The New Jersey requirements would interfere with the important federal interest of uniformity in cable television regulation and any local benefits would not be deemed to outweigh the burden imposed on interstate commerce. Indeed, the lack of fit between the objectives of the regulations (slowing growth in certain areas of the State) and the means selected to accomplish those ends (restricting cable network deployment, even though system extensions typically follow, rather

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than precede growth) further undermines the validity of the rules under the Commerce Clause. Likewise, the FCC also has determined that cable Internet service constitutes an interstate information service that should be regulated at the federal level. Congress has instructed the FCC to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” and to ensure that the Internet remains “unfettered by Federal or State regulation.” 47 U.S.C. § 157 nt; 47 U.S.C. § 230(b)(2). Application of the “smart growth” restrictions to cable television operators would interfere with the important federal interest in promoting the development of broadband services. (NJCTA)

RESPONSE: The rule amendments were drafted pursuant, in part, to the authority noted by the commentor, that is to say the Board believes that the rule amendments fall under the category of “certain specifically defined areas of authority delegated to State or local authorities.” As noted above, the FCC, at 47 U.S.C. § 541(a), allows a local franchising authority, in this state the Board, to authorize the construction of the cable television system over the rights-of-way including the cost of the installation, construction, operation, or removal of such facilities be borne by the cable television operator or subscriber or a combination of both. Since determination of who pays for installation of cable television plant is clearly within the Board’s purview pursuant to the cite provided, the Board is within its powers to adopt the rule amendments. Additionally, this method provides greater uniformity, as opposed to the prior method, because the decision as to where to require a cost allocation for line extensions is no longer

the subject of individual municipal negotiation, but instead based upon a Statewide determination. Furthermore, the proposed rule does not attempt to regulate any facility used entirely and solely for internet service, and thus the federal classification is not dispositive.

15. COMMENT: In both growth and non-growth areas, the proposed rule amendments violate the Fifth Amendment's Takings Clause because they interfere with a cable television operator's reasonable, investment-backed expectations and cause a significant economic impact on the cable television operator's use of its network. A cable television operator in compliance with its franchise has a reasonable expectation that it will be able to serve and earn revenues in its entire franchise area. In non-growth areas, the inability of cable television operators to fund line extensions exacerbates these problems by leaving cable television operators totally at the mercy of third parties for such funding. If such funding is not forthcoming, cable television companies lose the ability to serve potential customers and are effectively barred from making the fullest use of existing plant. The attenuated relationship between the goals underlying the smart growth restrictions and the efficacy of applying those restrictions to cable television enhances the likelihood that the restrictions amount to a taking. Exempting existing franchise agreements from the investment restrictions in non-growth areas pursuant to agreements with the

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regulators does not vitiate these takings concerns. For example, if, toward the end of the franchise term, new homes are built in a previously undeveloped portion of the franchise area that has the potential to be designated a non-growth area, the cable television operator serving that area is placed in an untenable position. If the cable television operator defers deployment of service extensions to those new homes until the point at which the area's growth designation is resolved, there is a risk that the cable television operator could be found in breach of its franchise agreement and its opportunity for renewal could be jeopardized. Alternatively, if the cable television operator deploys extensions to the new homes and its franchise is later renewed, it may not be able to provide those customers with services that require additional plant upgrades. Not only would such a result effectively exclude those customers from receiving the full range of services, it undermines the operator's reasonable investment-backed expectations associated with the initial deployment of that plant. (NJCTA)

RESPONSE: *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 118-123 (1978) provides that regulations that interfere with reasonable, investment-backed expectations of the property owner and cause a significant economic impact on use of the property violate Takings Clause. The Board does not believe that the rule amendments will constitute a takings. If reasonable investment-backed expectations could be met by using the current line extension policies, than certainly a Board rule requiring similar treatment to certain applicants for service extensions will not interfere with these expectations. The rule amendments are unlikely to cause significant economic impact especially

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considering the fact that in recent years, cable television operator's revenues have increased without significant additions to subscribership. The commentor states that cable television operators will be placed in an untenable position if it defers deployment of service extensions until an area's "growth designation is resolved." This comment seems to assume that some areas of the State have an unresolved growth area designation. This is untrue. Literally every inch of New Jersey falls into either a designated growth area or an area not designated for growth as defined by N.J.A.C. 14:3-8.2. Alternatively, the commentor suggests that it may not be able to provide plant upgrades to certain customers. This is untrue as the main extension rules do not apply to plant upgrades, only the extension of service. See N.J.A.C. 14:3-8.1(b).

16. COMMENT: The digital future can and should be a part of New Jersey's efforts to stem sprawl. Virtual communication opportunities can minimize the need for in-person interactions most often achieved today by automobile travel, reducing vehicle miles traveled and its concomitant congestion, which is one of the goals of Smart Growth. This benefit appears not to have been considered in the proposal of the rule amendments. Our members provide significant benefits to New Jersey. A number of considerations may have been overlooked when the decision was made to include cable television in the Board's Smart Growth rules. Cable television expansions follow, not lead, development, thus the inclusion of cable television in the rules will not help to advance Smart Growth goals.

(NJCTA)

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RESPONSE: While it is true that virtual commuting options such as telecommuting may ease congestion on highways, the rule amendments do not prohibit this. The State Plan recognizes that the causes of sprawl are myriad. Almost every actor, both private and public, may point to another as a more significant cause of sprawl. The rules simply require people who choose to develop in areas of the State not designated for growth, to pay for the cost of extending service. Therefore, the Board believes that it will best serve the goals of these rules by including all regulated entities.

17. COMMENT: The broadcast basic television reception level of service, which is the least costly level of subscription television service available, enables New Jersey residents to receive regional news which is not available via satellite. In communities too distant to receive the major broadcast networks out of New York and Philadelphia, those who cannot access cable television because of the prohibition will be unable to receive network programming and Emergency Alert System messages, which are made possible only by cable television and broadcast television. (NJCTA)

RESPONSE: Both Dish and DirecTV (satellite providers) offer local television (broadcast) channels. They are required to pass through channels without modification, which would mean that if the broadcaster carried an emergency alert message, the satellite provider would carry it as well. In addition the Board notes that the Federal Communications Commission is currently undergoing a Notice of Proposed Rulemaking to determine whether satellite

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providers should be included in the Commission's Emergency Alert System's rules (EB Docket No. 04-296, adopted 8/4/04).

18. COMMENT: The stated goal of achieving smart growth is more likely to occur with other utilities, which while they may have some alternatives available, a well, for example, you're not likely to find a developer, for reasons that have less to do with economics than it has to do with the difficulties of other kinds of regulatory hurdles that they have to go through, to go forward within a community entirely septic based or entirely based upon well water. But the pain of the environmental ramifications that would come to bear from that local community and surrounding area, we think, would probably be a stronger disincentive. Direct broadcast satellite ("DBS") does not have any kind of ramifications that are comparable so there is no second thought for a developer as to whether or not to choose a viable alternative to cable television. It's not that the overall goal can't be achieved, but when you apply it specifically for cable television you won't so increase developers by including cable television that you're providing - - the disincentives that you're seeking, but so severely disadvantages the cable television company and ultimately the customer that lives there. (NJCTA)
- RESPONSE: Alone, any of the regulated industries would not be enough to spur development. However, taken as a whole, each of the regulated entities can and do spur development. In this light, the cable television industry must be seen as contributing to the cumulative impact of all of the regulated industries. In response to the comment that development could not take place absent public necessities such as gas, water and electricity, the Board disagrees. The gas

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industry has filed similar comments that they are not needed for development, that propane, oil, or electricity can replace them. We have also seen that wells can replace water; solar or wind can replace electric utility service. The rules simply require people who choose to develop in areas of the State not designated for growth, to pay for the cost of extending service. All regulated entities must be included in the Board's smart growth rules for the rules to be unified and meaningful.

19. COMMENT: The First Amendment rights of cable television operators make it incumbent upon the Board to promulgate regulations with sufficient specificity to enable operators to ascertain how and when their ability to speak to residents will be affected or curtailed. The proposed smart growth rules, as applied to cable television operators, are unconstitutionally void due to vagueness. (NJCTA)

RESPONSE: The Board believes that the rule amendments are clear. The rule amendments require that from the effective date of the rule amendments, for any Certificate of Approval issued where the ordinance was adopted after the date of the rule, if the area is in Planning Area 1, Planning Area 2 or a designated center, the cable television operator must provide service in accordance with its tariff; if the area is not designated for growth, the cable television operator may not contribute to the cost of the extension.

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20. COMMENT: Cable television companies should be exempt from the Board's smart growth rules. However, the proposed amendments should apply to cable television companies that provide telephony in the same manner that they would apply to traditional telecommunications carriers. The service distinctions should remain clear insofar as cable television and telecommunications services are distinct separate service operations. In this way the Board would be notified of any cross subsidization. The Board should apply structural separation requirements in order to promote safeguards against cross subsidization. Both cable television companies and telephone companies that offer cable television service would be covered by the "cable exemption" for cable television services. (RPA)

RESPONSE: Most cable television companies in the state either provide or have the ability to provide telephony services. Telecommunications and cable television are provided over a common network. Separate lines are not extended based on the particular service offered by the particular company; that is, a cable television company that intends to offer telecommunications services will not extend two separate lines; one for cable television and one for telecommunications. It would be impossible to separate what the construction of the networks would be used for. Furthermore, the Ratepayer Advocate provides no reason why the cable television industry should be exempt from the Board's smart growth rules. Therefore, the Board declines to make the modification requested by the Ratepayer Advocate.

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21. COMMENT: Proposed N.J.A.C. 14:3-8.2 allows for regulated entities to charge customers for costs that are not considered extension of service that is necessary for an installation of service. An extension of service is not routine maintenance and represents a major additional plant development. Infrastructure costs can be recovered by the cable television company via the FCC Form 1235. A cable television company that forgoes recovery via an add-on rate pursuant to FCC Form 1235 should still be required to file the form. In addition, the FCC Form 1235 allows for recovery of equipment and installation costs. Because there are existing cost recovery methods for infrastructure development costs, there is no need to create any additional financial burdens on cable television customers. In addition, the Board may be called upon to ensure that costs borne by developers are excluded from a cable television company's rate filing. (RPA)

RESPONSE: As noted above, the Board has the authority to determine how costs are allocated for construction of cable television plant, pursuant to 47 U.S.C. § 541 which allows a local franchising authority, in this state the Board, to authorize the construction of the cable television system over the rights-of-way including the cost of the installation, construction, operation, or removal of such facilities be borne by the cable television operator or subscriber or a combination of both. The Board understands that there may be some additional burden to potential customers or developers in areas not designated for growth but it believes requiring people who choose to develop in areas of the State not designated for growth, to pay for the cost of extending service, is reasonable to achieve the State's "smart growth" goals. Furthermore, while FCC Forms 1235

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and 1205 permit cable television companies to recover infrastructure and installation costs through its rate filings, cable television companies are not required to file these forms. In addition, since the Board reviews all rate filings, and since cable television companies are required to abide by N.J.A.C. 14:3-6.2 and 14:18-6.2 which requires cable television companies to keep records of advance payments and total expenditures for extensions, which would be available for review by Board staff, if found to be necessary.

22. COMMENT: Proposed N.J.A.C. 14:18-3.2(g) mandates how cable television companies will handle extension of service requests in areas not designated for growth for Certificates of Approval issued after the effective date of the rule and requires that the Certificates include language that the cable television company will comply with the Board's smart growth rules. The provision is unnecessary because the adopted rules have a prospective effect and must be complied with. (RPA)

RESPONSE: The intent of 3.2(g) is to ensure that all parties are fully informed of the rules. Inclusion of a statement within a certificate of approval issued for which an ordinance is adopted after the effective date of these rules will ensure that all readers understand the ramifications of the rules being adopted herein.

23. COMMENT: Proposed N.J.A.C. 14:18-3.2(h) specifies that in areas designated for growth, any Certificate of Approval or Renewal Certificate of

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Approval issued after the effective date of these rules must specify that cable television company provide service in accordance with its tariff on file with the OCTV or in accordance with a municipal consent ordinance as approved by the Board requires cable television operators. The FCC Form 1235 is the proper vehicle for recovery of capital costs related to plant growth. In areas where no cable television exists, and new plant specific to that location is required, then the existing mechanism should be used. (RPA)

RESPONSE: As noted above in Response No. 4 above, the Board has the authority to determine how costs are allocated for construction of cable television plant, pursuant to 47 U.S.C. § 541, which allows a local franchising authority, in this state the Board, to authorize the construction of the cable television system over the rights-of-way including the cost of the installation, construction, operation, or removal of such facilities be borne by the cable television operator or subscriber or a combination of both. The Board took the comments of the cable television operators submitted under the previous rulemaking, 36 N.J.R. 5928, into consideration. The cable television industry stated that costs for cable extensions in developed areas (smart growth areas) can be significantly higher but the Board was requiring cable television companies to provide service without any cost beyond the tariffed installation rates. The cable television industry further stated that this was unfair because all other regulated entities were not held to this standard. The Board agreed and therefore, when the rules for cable television were re-proposed, it only required cable television companies to provide service in accordance with municipal consent ordinances granted to it, or

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in the absence of specific terms within the municipal consent ordinance, in accordance with the cable television company on file with the OCTV.

24. COMMENT: N.J.A.C. 14:18-11.2(a)6i requires that cable television companies include a statement in the municipal consent application that they will comply with the provisions of N.J.A.C. 14:3-8. The provision is unnecessary because the adopted rules have a prospective effect and must be complied with. (RPA)

RESPONSE: The intent of 11.2(a)6i is to ensure that all parties are fully informed of the rules. Because municipalities will not necessarily know what the effect of the rules will be on them, the inclusion of a statement within the municipal consent application, upon which the municipality bases its municipal consent ordinance, is important so that the municipality understands the effect of the rules on the municipal consent being requested by the cable television company.

25. COMMENT: Verizon NJ supports the proposal to apply the plant extension rules equitably to cable television companies and requests that the Board pursue forward-looking policies that recognize the changing competitive landscape in New Jersey. (VZ1, VZ2)

RESPONSE: The Board appreciates this comment in support of the rule amendment.

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26. COMMENT: Given the ever-growing convergence of technologies, some of which the Board does not regulate, the best and most equitable long-term solution here is to exempt both telecommunications companies and cable companies from the smart growth rules. (VZ2)

RESPONSE: The Board does recognize the convergence of the television and telecommunication industries. Making distinctions between them, as far as extensions of service are concerned is becoming more and more difficult. Therefore, the Board believes that it will best serve the goals of these rules by including all regulated entities in the smart growth main extension rules as proposed by these amendments. In this way, people who choose to develop in areas of the State not designated for growth, pay for the cost of extending all and not just some of their regulated entity services.

27. COMMENT: In addition to incorporating the smart growth extension rules only into any new or renewed municipal consent, Verizon NJ also requests that Board determine that smart growth rules apply to all existing municipal consent orders. (VZ2)

RESPONSE: The Board believes amending existing municipal consent orders would present prohibitive administrative and other obstacles. Therefore, the Board did not make this suggested change upon adoption and will only require future municipal consent orders to comply with the smart growth main extension rules.

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28. COMMENT: The convergence of technologies has enabled cable companies to provide voice and data services, and enabled telecommunications companies to provide cable TV services. The smart growth rules must recognize these changes – by ensuring a level competitive playing field among inter-modal providers – to ensure that the free-market, rather than regulation, picks winners and losers. Symmetrical regulations that apply evenly to both cable and telecommunications companies would help ensure this goal. (VZ2)

RESPONSE: As noted above, the Board does recognize the convergence of the television and telecommunication industries. Making distinctions between them, as far as extensions of service are concerned is becoming more and more difficult. Therefore, the Board believes that it will best serve the goals of these rules by including all regulated entities in the smart growth main extension rules as proposed by these amendments.

Federal Standards Statement

Executive Order No. 27(1994) and N.J.S.A. 52:14B-22 through 24 require State agencies that adopt, readopt or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The adopted repeals, amendments and new rules are not promulgated under the authority of, or in order to implement, comply with or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards or requirements. In addition, while there are many Federal laws relating to the regulated

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entities and regulated services affected by the proposed amendments and new rules, none relate to the distribution of infrastructure extension costs between the regulated entity and the applicant for service. Accordingly, Executive Order No. 27(1994) and N.J.S.A. 52:14B-1 et seq. do not require a Federal standards analysis for these adopted amendments and new rules.

Full text of the adopted rules may be found at: N.J.A.C. 14:3-8, 5-2.1, 6-3.1, 9-2.1 and 14:18